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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 180

MARIO MERCADO RIERA, Accounting as Executor of the Estate of Mario Mercado Montalvo,

Petitioner,

V.

ADRIAN MERCADO RIERA and MARIA LUISA MERCADO RIERA DE BELAVAL,

Respondents.

MEMORANDUM ANSWERING RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI OR, IN THE ALTERNATIVE, FOR THE ISSUANCE OF A WRIT OF MANDAMUS TO THE CIRCUIT COURT OF APPEALS.

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To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

In view of Respondents' brief raising new and unexpected questions of jurisdiction, Petitioner is being forced to rely on the mercy of this Court to allow and consider this Reply Memorandum.

I

Legal Situation as Presented by Both Petitioner and Respondents.

I—The petition in this case was filed in July 1948. It shows the presence of the following federal and local questions of law:

First: Questions of the interpretation of the Federal Estate Tax Law and the regulations of the Internal Revenue Bureau of the United States in relation to the taxability of the estates of United States citizens from Puerto Rico (Pet. Br. 3-4 and 26-34).

Second: Questions of due process, Fifth and Fourteenth Amendments to the Constitution of the United States, and Sec. 2 of the Organic Law of Puerto Rico, 48 USCA 737 (Pet. Br. 5-6 and 34-46).

Third: Meritorious and important questions of local law, requiring examination by the Circuit Court and by this Court under *De Castro* v. *Board of Commissioners,* 322 U. S. 451; also *Hijos* v. *Commins,* 322 U. S. 465 (Pet. Br. 7-11 and 54-74).

II—The brief in opposition to the petition for certiorari or writ of mandamus which was filed by Respondents, presents substantially the following questions for us now:

First: Petitioner's capacity to file these proceedings as Mercado Riera, accounting-executor.

Second: Denies the presence in this case of federal questions, statutory or constitutional.

Third: Treats the question of local law, as not requiring, under rule 39 (b), review by the Circuit Court of Appeals, or by this Court.

Fourth: Raises other questions of technical but of minor importance which shall be succinctly answered by us now.

II

Our Original Contentions: The Presence in This Case of Federal Questions of Law, Statutory and Constitutional Is Patent.

The questions of federal law, statutory and constitutional, actual and present in these proceedings, and discussed in our petition and brief, are palpable. Respondents' efforts to deny them are futile.

1. Over 600 pages of the record point to the presence and significance of *the federal estate tax question* (Pet. Br. 3 and 26). This question is a paramount one, from both the economic and legal point of view. (Mercado's and Porrata's Testimony T. E. 432-527; 558-961; Ruiz Nazario's Testimony, T. E. 1358-1833, 1749 (A)-1830, and Acosta Velarde's Testimony, T. E. 1471 (A)-1516 (A); D. P. 160-311, 431-433, 458-486, etc.) (Pet. Br. 3 and 26.)

2. The constitutional questions are no less patent. As shown by the deliberate non-joining of parties (partnership and Porrata, for example) who, as signers, are economically interested in the Compromise Contract, Respondents intentionally procured the adjudication of rights arising under that contract *without due process*. The interest, indispensability and necessity of joining these excluded signing parties, is suggested, and even conclusively deter-

mined, by the bare and poignant fact that they contracted with the objectors, Respondents herein, in matters of significant economic value in said Compromise Contract (Pr. Rec. 94-124). Said contracting parties cannot now be skirted or shoved away by any accommodating or self-serving explanation that the interpretation of and adjudications under the Compromise Contract were obtained in testamentary proceedings. Why?: because, among other reasons, in testamentary proceedings the Compromise Contract was agreed to and signed by the parties to it including the Partnership and Porrata; *which signing parties mutually admitted thereby the undeniable corresponding interest of all the other signers.* (Comp. Cont., Pr. Rec. 94, *et seq.*; see also Pet. Br. pp. 5, 6, 34 and 46 where this question of due process is discussed.)

3. The Petition and Brief, pages 7-11 and 54-74, show the nature of the questions of local law present here. These questions concern substantial sums of money and they are of those which, under the *De Castro* case impose upon the Circuit Court of Appeals and upon this Supreme Court, *the delicate task of examining and appraising the Puerto Rico law in its setting.* 322 U. S. 458.

4. The short opinion of the Circuit Court, enthusiastically cited by Respondents in their brief, pp. 6-7, does not constitute or show the examination required in the *De Castro* case by this Court *or any appraisal whatsoever of the local law in its setting.* It is this examination and appraisal, revealed by an analysis of facts and law, that give to the legal profession the satisfaction that the case has been duly considered by the adjudicating tribunal. A denial of a full hearing in this case, and of the benefits of an opinion containing an analysis of facts and law, was in our judgment, and with due respect to contrary understanding, tantamount

to a denial of the right to appeal which Congress granted to Puerto Rican litigants, for reasons pertinent to the powers granted to said body by Article IV of the United States Constitution, 28 USCA Sec. 225, p. 295, 4th, and, as stated in said *De Castro* case, it is only in very exceptional cases that summary dismissals or affirmance are proper. The function of appraising the local law in its setting is a *"delicate task"*, this Supreme Court said, which *"ordinarily cannot be performed summarily"*, 332 U. S. 458. (Italics ours.)

III

Question of Petitioner's Capacity.

Let us answer now the question of the capacity of Mercado Riera to act in these proceedings as accounting-executor.

A—To begin with, the objections to the final accounts of the executor, filed by Respondents themselves on March 16, 1940 (Pr. Rec. 26-36), proceeded against Mercado Riera *as executor*. The objections were filed under the Compromise Contract (Pr. Rec. 35 m.) and according to Sec. 588 *et seq.* of the P. R. C. of C. P. Furthermore, the judgments of both Puerto Rico courts surcharged Mercado Riera *as executor*. (Pr. Rec. 88-92 and 193-196.)

And the prayer attached to Respondents' objections contains such procurements as that the Court dispose of the case by "entering a final order rejecting the impeached items *charging same to the executor*" etc. (Italics ours) (Pr. Rec. 35 b.). These objections, it is important to notice, were filed by Respondents, long after the alleged cessation of the executor activities, which, it is claimed, occurred in September 1939.

Moreover, the objectors filed the objections to the executor accounts, wherein: in proceedings No. 782 of the District Court of Ponce, entitled "Mario Mercado Riera, executor, Letters Testamentary" (Objections, Ty. Rec. J. R. 18). Respondents thereby took advantage of the summary proceedings provided by the Puerto Rico Code of Civil Procedure only for the settlement of accounts of persons accounting as executors. (P. R. C. of C. P., Sec. 588, *et seq.*).

Summarizing, the objection to the final accounts (Pr. Rec. 26-36), the summary proceedings of which the objectors took advantage in this case, the judgment of both, the District and Supreme Court of Puerto Rico, and everything represented in the record, reveals that this was a proceeding against Mercado Riera as accounting-executor under the Compromise Contract *and that he is entitled to defend himself in the character in which he was sued.*

B—However, the pertinent provisions of the Code of Civil Procedure of Puerto Rico support our theory that Petitioner, surcharged as accounting-executor, may appeal and identify himself with the character in which his accounts were surcharged.

Sec. 588, *et seq.* of the P. R. C. of C. P. proves our contention. It provides:

> "Whenever the administrator or executor . . . *for any reason ceases to be such administrator or executor he shall file with the court a final account.*" (Italics ours.)

Consequently, the accounting functions of an executor start under the Puerto Rico Code *when the executor ceases in his ordinary functions as executor.* And then the Code provides, Sec. 590:

"The District Court shall make a final order approving the account as rendered or modifying and amending it, *and charging the executor or administrator* as the law may require, *and an appeal may be taken from such final order.*" (Italics ours.)

Under the Code provisions cited *ante*, the executor retains his position for the purposes of accounting until his case is finally settled and he is discharged according to law. And the law provides that he is to be charged as executor and can appeal from the final order as such even though he ceases in his ordinary activities.

The situation is eloquently illustrated by the following citation from the case of *Boerman* v. *Heirs of Boerman*, 52 P. R. R. 593:

"The order terminating the judicial administration puts an end to the administrator's activities, *but it is the order approving the final account that finally relieves him or her of responsibility.*" (Italics ours.)

C—The situation in Puerto Rico is the same as illustrated in the Minnesota case of *Clover* v. *Peterson* (Minn.) 104 A. L. R. 1188, and the California case of the *Estate of McPhee*, 154 Cal. 385.

In *Clover* v. *Peterson*, a leading case in our jurisprudence, the doctrine may be summarized as follows:

". . . *If others may so attack him in his representative capacity*, why may he not *in the same capacity* resist the attack? When attacked in one capacity, *why must he defend in another?* . . . When his official conduct is condemned, the reaction necessarily reaches his personal interest. *But the fact remains that it is his official conduct that is condemned. Obviously then the*

official is 'aggrieved' notwithstanding the result as to the person who happens to be the official. See *Johnson* v. *Lundgren,* 194 Minn. 300, 260 N. W. 295."

" . . . *Impractical and unjust* would be a rule compelling representatives always to defend their official conduct and their official record thereof solely as to individuals." (Italics ours.)

See also 33 C. J. S., Ex. and Adm., Sec. 79a:

"Ordinarily an executor or administrator is not entitled to a final discharge *until after full settlement of the estate.*

"The court has no legal authority to discharge the executor or administrator, pending a complete settlement of the estate, except as the statute may have permitted, *and the usual rule is that a representative is not entitled to his final discharge until after full settlement of the estate,* including final payment and delivery of all the property by way of distribution to those entitled to the balance, *and the rendering and approval of his final accounts.* When, however, an executor or administrator has fully performed all of his duties, he is entitled to be discharged from the trust." (Italics ours.)

And, in California, even the revocation of Letters Testamentary (which did not happen in our case), does not affect the accounting-executor's right to appeal in the character in which his accounts are surcharged. This appears plainly and emphatically from the opinion in the case of *Estate of McPhee,* 154 Cal. 385, 392, quoted below.

"It appears that subsequent to the order settling his accounts the superior court revoked the letters of

administration of appellant. Thereafter, he appealed from the order of settlement. *Respondent insists that appellant had no right to appeal as administrator after the revocation of his letters. This point has no force. The statute confers on the administrator as such the right of appeal from an order settling his accounts and the right to do so cannot be affected by any order revoking his letters.* (*Ours: See Section 590 of the Puerto Rico Procedural Code to the very same effect.*) The cases of *Kerns* v. *Dean,* 77 Cal. 555 (19 Pac. 817), Ex parte McDermott, 127 Cal. 450 (59 Pac. 783), and Estate of Danielson, 88 Cal. 480 (26 Pac. 505), cited to sustain the position of respondent are entirely inapplicable. *This is so apparent that it would be time ill-spent to particularly point it out.*" (Italics ours.)

Our code of Civil Procedure follows that of California (Op. on Recon. Pr. Rec. 198).

In our case there was no revocation of Letters Testamentary. *Mercado* v. *Mercado,* 152 Fed. (2d) 86, interpreted a clause in the testator's will, which clause extended "the term of one year provided by law to all the time that may be necessary for [the] execution of the trust" (Pr. Rec. 128). Said case came to the Circuit from the Supreme Court of Puerto Rico; which Court held that the extension provided in the will, though amply conceived, under the Civil Code, meant only one year.

There was, therefore, a cessation *de jure* of activities because of the interpretation that time had lapsed. However, it should be noted, that, later in the opinion on reconsideration in this case (Pr. Rec. 198), the Supreme Court of Puerto Rico was then confronted with the proposition that the Law for Special Legal Proceedings, *of more recent enactment than the Civil Code,* superseded all laws in con-

flict therewith (Pr. Rec. 201).[1] The terms for the fulfillment of the executor's function under the Puerto Rico Law of Special Legal Proceedings, is until the accounts are finally liquidated by a final decree of the Court, *the same situation as generally prevails in the United States.*

D—But there is another significant fact to be observed. In his appeal from the District Court of Ponce to the Supreme Court of Puerto Rico, the accounting-executor concocted the appeal in the following language:

> "Now come the executor Mario Mercado Riera, who rendered the accounts the subject of these proceedings No. 782, in the matter of the objection to the final accounts of the executorship . . ." (Pr. Rec. 92-93).

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1 It was also stated in *Mercado* v. *District Court, supra, that in the absence of any new statute it cannot be maintained that the substantive provisions of our Civil Code regarding the appointment and duties of the executor and the term of the executorship may be considered as changed or modified as to their scope as substantive law by the procedural provisions of the Special Legal Proceedings Law.* To this effect we must keep in mind the provisions of §619 of the Code of Civil Procedure (Section 85 of the Special Legal Proceedings Law) which reads as follows:

> "This Act shall take effect from and after its passage, and *all previous laws in conflict herewith are hereby repealed;* but the special proceedings established in the Civil Code, in the mortgage law and its regulations, and in any other law, in so far as not provided for by this Act, remain in force."

We know of no constitutional provision which precludes the Legislature *from enlarging or changing by an adjective law* the provisions contained in the Civil Code on the same matter, *and there is no legal reason whatsoever which precludes the repeal of a provision of the Civil Code by a subsequent procedural law.* Since §586 of the Code of Civil Procedure was approved after §882 of the Revised Civil Code, said section was partially repealed insofar as it establishes that the office of executor is gratuitous. (Italics ours.) (Pr. Rec. 201).

And Respondents also appealed on March 2, 1942, notifying Francisco Parra Capo *as attorney for the executor* (App. Rec. before the Circuit Court of Appeals, p. 45 b.).

No question was raised before the Supreme Court in regard to the capacity of Mercado Riera to appeal as accounting-executor. If any would have been raised, it would have been frivolous. No question can be raised here now. *Bank of Arizona* v. *Haverty*, 232 U. S. 106 and also 70 L. Ed. 916.

E—Moreover, in view of the fact that the appeal to the Circuit Court was taken by Mercado Riera describing himself as accounting-executor (Pr. Rec. 1-5; Pr. Rec. 6), the Louisiana doctrine does away with baseless technicalities, and is as follows:

Succession of Brand, 170 *La.* 411, 127 So. 885:

> ". . . An administrator may appeal if aggrieved in his individual capacity, even if he describes himself erroneously as administrator."

F—The cases cited by Respondents, without showing in any way how they apply to the facts of our case, in a footnote on page 9 of their brief in opposition, are inapplicable.

Ex-parte Zalduondo, 47 P. R. R. 249, *was not the case of an appeal by an accounting-executor.* From a short reference to a point, not necessary for the decision of the case, it appears that the partitioner (not the executor) *had already performed all his functions.*

In our case, the executor is performing his paramount duty of accounting. The essential facts, therefore, are different; the duties are different; the law and everything

is different in what may concern the facts of that case as compared with the facts of ours.

Slater v. *Thompson,* 225 Fed. 768, is of no application either. Slater was not accounting in that case as executor: he was trying to intervene in a suit in equity in the lower court after he was no longer executor. How could he? Mercado in this case is answering as executor under the Compromise Contract entered into with debtors and creditors of the estate, and he is answering according to Sec. 588 *et seq.* of the P. R. C. of C. P.

Taylor v. *Savage,* 11 L. Ed. 132, cannot be used by Respondents. The doctrine of that case is applicable only when the executor is suing in the name of the estate, and he is removed before the appeal is taken. Said case cannot be even suggested for application to the case of an executor sued to account under a contract and according to the Puerto Rico Civil Procedure Code. The cases applicable then are the *Boerman* case; *Clover* v. *Peterson* and *Estate of McPhee, ante.*

In *Kimball* v. *Kimball,* 43 L. Ed. 932, a petition was filed for letters by Maude Kimball. She claimed to be the widow of E. Kimball. Petition was denied. Ground: that the marriage of Kimball was void. She appealed. During the pendency of her appeal, another will was found and other persons were appointed administrators. Hence, it was decided that, in view of the intervening events, *the appeal had become moot.* Those facts are not even distantly similar to the legal situation of a person accounting as an executor under our P. R. C. of C. P.

Respondents' citations from C. J. S. and C. J. are even less related to our case. For example, 4 C. J. S., App. and Arr., Sec. 182, states the general rule as follows:

> "If a party ceases in his representative capacity, he cannot appeal in that capacity."

The above is the doctrine of *Taylor* v. *Savage, ante.* Our case is not that of an executor suing anybody's name. This is a case of a person accounting as executor for what he received under the Compromise Contract. He is to be sued, and was sued, as executor, and surcharged as executor P. R. C. of C. P. Sec. 590. He will also be relieved from his official responsibility as such executor. *Boerman* case, *ante.*

G—In view of the provisions of the Puerto Rico Code of Civil Procedure, *Mercado* v. *Mercado, ante,* does not affect the right of Petitioner to describe himself as accounting-executor.

There is no particle of logic in Respondents' argument that the case of *Mercado* v. *Mercado* affects the right of Mercado to appeal in the character in which he was sued as accounting-executor. There is a plain and patent difference between suing in the name of the estate and accounting as executor of an estate. *Clover* v. *Peterson* and *Estate of McPhee, ante,* point to this undeniable and logical difference, which difference cannot be obliterated by arguments directed to the support of a theory plainly technical and contrary to law.

Moreover, *Mercado* v. *Mercado* did not settle, and could not settle matters relating to the partition of the estate. Said case only recognized that said partition was to be made according to the Compromise Contract. That is all the effect that can be given to the *Mercado* case in regard to partition. The Compromise Contract lays down the general rules of partition, obligatory upon all signers, but it was not in itself and could not be the deed of partition, as shown by letter "m" of said Contract, providing that "the partitioner's report on the estate left at the death of don Mario Mercado Montalvo, *shall be executed by aforesaid partitioner and aforesaid four universal heirs.* . . . and

said Mister Porrata agrees that his total fee for the study, *preparation and execution of aforesaid partitioner's report on the distribution of the inheritance as provided in this contract,* with four certified copies to be furnished the heirs, should be and shall be twenty thousand dollars" etc. (Pr. Rec. 113, letter M). (Italics ours.)

H—Mercado Riera never divested himself of his character and obligations as accounting-executor. The alleged admissions (Respondents' Brief, p. 13), that the executor divested himself of the estate, except as co-owner, cannot be interpreted as meaning that he divested himself of his duties to account, which he was doing in a proceeding already going on in the Supreme Court of Puerto Rico. The duty to account is a legal requirement of the code, of which no executor can divest himself by his own will. P. R. C. of C. P. *ante.*

IV

This was not a case to be summarily affirmed or dismissed by the Circuit Court under Rule 39.

Rule 39 is divided into two sections, (A) and (B). The first requires the showing of the manner in which the federal questions alleged were raised. The second requires a *Statement on Appeal,* in which the appellant is supposed to show, even before the controversy starts and the record is printed, that the decision below, in matters of local law, is inescapably wrong, or patently erroneous. Part (B) of Rule 39 has met with plenty of complaints from the profession in the Island. In *De Castro* v. *Board of Comm.,* 322 U. S. 451, it was modified by this Supreme Court.

> "Thus interpreted and read in its context the principle, as restated in the Sancho Bonet Case, *that to justify*

reversal by the federal courts of a decision of an insular supreme court in a matter of local concern, 'the error must be clear or manifest; the interpretation must be inescapably wrong, is *not a mere mechanical device which requires or admits, save in exceptional cases, of the summary disposition of appeals from that court. Nor does it minimize the importance or dignity of the appellate function in such cases.* On the contrary, *we think that it imposes on the Court of Appeals and on this Court the peculiarly delicate task of examining and appraising the local law in its setting,* with the sympathetic disposition to safeguard in matters of local concern *the adaptability of the law to local practices and needs. It is one which ordinarily cannot be performed summarily or without full argument and examination of the legal questions involved.*" 322 U. S. 458. (Italics ours.)

Respondents in their brief show a misunderstanding of the situation as explained and existing after the decision in the *De Castro* case.

When a question of local law is presented to the Circuit Court of Appeals, it is the task of that Court (called "delicate" by this Supreme Court) to fully appraise and examine the local law in its setting. After an appraisal of the local law ("with the sympathetic disposition to safeguard in matters of local concern, the adaptability of the law to local practices and needs"), the Court will then decide whether a clear and patent error, requiring reversal, was committed. *The doctrine of regard for local needs and practices is not a mechanical device to dismiss appeals, and provides no fetishism in favor of the decisions of the local courts.* This is the true situation now in regard to matters of local law.

Ours is a case where the principle of sympathetic regard for practices and needs is not relevant. Where is the local need or practice to be protected by the summary dismissal or affirmance of Petitioner's appeal? We are not dealing here with the 500 acre law or with the anti-monopoly statute, or any other public law—We are dealing here with the rights of people under statutes imported into Puerto Rico from the United States, and with questions of federal law, statutory and constitutional. If there is any ground for sympathy, it should be in the interest of an examination of the rights alleged to have been infringed. In our judgment from either the standpoint of local or federal law, statutory and constitutional, the refusal of the Circuit Court to hear this case on the merits, should be examined.

Rule 39 B of the Circuit Court, affects two million people. It contravenes a statute of Congress authorizing this appeal (28 U. S. C. A. Sec. 225, P. 295, 4th). And it is our firm belief that it should be repealed, not merely explained or modified as done in the *De Castro* case. Whether an error is or is not inescapable, is something to be decided within the merits of the case, and should never be a device to prejudice or dismiss appeals or *to practically modify an act of Congress given the right to appeal.*

Take, for example, one of the errors of local law alleged by Petitioner (those of federal law need no further illustration):

1—Mario Mercado Riera, accounting under the Compromise Contract, alleges that the Puerto Rico Court committed error in ordering him to make restitution to the estate of the sum of $20,019.15, paid as inheritance tax on the monies passing to the Partnership Mario Mercado e Hijos under said Compromise Contract (Pet. and Br., 10 and 24).

2—The opinion of the District Court of Ponce, in regard to this question, reads:

"With respect to part (B) of said impeachment No. 12, in connection with a restitution to the objectors of the sum of $20,019.15, as half of the inheritance tax paid on monies *belonging to the Partnership Mario Mercado e Hijos but which were improperly declared in the notice of decease of decedent Mario Mercado Montalvo* (ours: where is the improper declaration?), the court, as a result of the evidence introduced by both parties, concludes, and it so holds, that said $320,306.53, *as covenanted in clause third, letter (d) of the contract of compromise of September 9, 1938* (ours: to which contract the Partnership was a signing party), *exclusively belonged to the Partnership Mario Mercado e Hijos an entity distinct and apart from the decedent.* And, therefore, said sum of $320,306.53 was improperly included by the executor as part of the cash assets, in his notice of decease of the testator Mario Mercado Montalvo (ours: see illustration of what the executor really did, page 20, *infra*), and, therefore, *the inheritance tax paid upon aforesaid amount should not have been paid by the executor and charged to the estate of aforesaid testator.* (ours: means that Partnership must pay.)

"Therefore, the court is of the Opinion, and it so holds, that it should sustain (B) of the impeachment No. 12, and that, therefore, it should order, and hereby orders, that the executor make restitution to the final accounts, with legal interest, to the objectors, of the sum of $20,019.15, which is one half of the inheritance tax *improperly paid by said executor on a sum of money belonging exclusively to the Partnership Mario Mer-*

cado e Hijos" (Pr. Rec. 79). (ours: Court omitted to consider that the $320,306.53 were in testator's name at the time of his death.)

3—Looking at the mere language of the opinion of the Court, without regard to the intrinsic value of the reasoning, the above holding may seem right. Fundamentally, upon examination (*De Castro* case, *supra*), it is utterly erroneous. Let us see.

As appears from the Compromise Contract, at the time of the testator's death, there were $576,306.53 *"deposited in the name of the aforesaid testator in the Bank of Ponce and National City Bank of New York"* (Pr. Rec. 109-110). (Italics ours.) From this sum of $576,306.53 (we repeat: *which was in bank in the testator's name at the time of the testator's death*), the sum of $320,306.53 "entered in full" under the Compromise Contract, and became an asset of Partnership Mario Mercado e Hijos. *The Treasury of Puerto Rico was not a party to said Compromise Contract* (Pr. Rec. 94), *a fact very significant indeed.*

The situation, therefore, must be viewed in either one of two ways.

(A) Does the Puerto Rico Court mean that the executor was compelled by the Compromise Contract to conceal from the Treasury that $576,306.53, and not merely $256,000.00, *were in banks in the testator's name at the testator's death.* If it means that, the error is patent and inescapable, or even inconceivable, *to require of a quasi-public official the commission of an illegal act.* In other words: informing the Treasury of the total amount of money that was in banks in the testator's name at his death was not only a proper act of the executor, *but it was a plain legal obligation.* (Inh. Tax Laws of P. R., Laws of 1939, pages 672-3, sec. 5.)

(B) However, if the executor committed no wrongful act in disclosing the truth, the facts, to the Treasury, then if any controversy arises under the Compromise Contract, signed by the objectors and the Partnership, as to who should reimburse the tax paid on the monies passing to the Partnership (which the Treasury decided were to be computed in any way as a part of the estate), that controversy is between the objectors and the Partnership; never between the objectors and the executor, who merely informed the truth to the Treasury.

As the Partnership, signer of the contract, was not joined, the lack of jurisdiction is patent.

In other words: the legal obligation of an executor to pay the tax assessed is unquestionable. (Inh. Tax Law of P. R. Sec. 9, 1941 Compilation pp. 1176-1177.) If, under the Compromise Contract, the objectors had any right to be reimbursed for the tax paid from the Partnership, it was the duty of the objectors to raise the controversy with the Partnership, never with the executor.

4—The executor, it may be added by way of explanation, when informing the Treasury as to the amount of money in the testator's name at his death, did not add to the gross of the estate the $320,306.53 passing to the Partnership under the Compromise Contract. He simply complied with the contract and with his duties to the Treasury, reporting the situation as it truly and really occurred, in the following manner:

"Notification of Death (D. P. 105)

"Part of money in banks (Ours: in the addition and carrying forward column) $256,000.00

(Ours: Indented explanation given by the executor in the notification of death, and which shows that the $320,306.53 passing

to the partnership were not added to the assets of the estate):

"In the National City Bank Ponce Branch	$201,871.02
"In the National City Bank principal office at New York, N. Y.	200,084.95
"In the 'Banco de Ponce' Ponce, Puerto Rico	174,350.56
"Total of deposits	$576,306.53

"Note:—(Ours: placed by the executor to show the facts)

"The $320,306.53 which is the rest of this money, as owned by the decedent by the date of his death, shall pass without deductions, to the Partnership Mario Mercado e Hijos, to form the reserve fund of said Partnership."

In the manner indicated above, the executor complied, as is stated before, with his duty to the Treasury. Of his compliance with his legal obligation, no person has the right to complain. Neither can anybody complain of his paying the tax after it was assessed.

5—Furthermore: the objectors were notified of the final assessment and conclusion by the Treasury itself, under Section 7 of the Inheritance Tax Law of Puerto Rico. And, what is more important, *the objectors accepted the assessment and even complained of the executor's appeal to the Board of Review and Equalization* (Test. of Mr. F. Julia, Head of the Tax Bureau of Puerto Rico, T. E. 1153-1214).

For other mixed questions of local and constitutional law, see Petition and Brief, where a preliminary discussion is made to help this Court form its judgment.

V-A

Constitutional Questions: No case can proceed to judgment if indispensable parties are not brought into the proceedings.

A. In regard to the constitutional questions: it cannot be contested that the Partnership, Porrata and the four brothers, all of them, *were signers of the Compromise Contract, under which this impeachment of accounts proceeded.* Why the Partnership was not joined as a party to these proceedings, *is something that requires an examination here in the interest of real justice.* This Court may find that the objectors are trying to avoid the defenses that the Partnership might have against them, and that Porrata might have, too. It seems only fair and logical to say that each and every one of the signing parties to the Compromise Contract was bound to assume his responsibility to face the other party in the substantive as well as in the procedural way. Our case, it seems to us, is a typical one for this Supreme Court, either to order the Circuit Court to examine the questions presented fully, or to order a review here, so that justice be amply done to all parties concerned.

B. No case can go to judgment if indispensable parties are not called to the proceeding.

Shields v. *Barrow*, 58 U. S. 130 (1854);
Barney v. *Baltimore City*, 73 U. S. 280 (1867);
Commonwealth Trust Co. v. *Smith*, 266 U. S. 152 (1924);

Mine Safety Appliance Co. v. *Forrestal,* 326 U. S. 371 (1945);

Rule 19. *The fact that the judgment would not be technically binding upon the absent parties is not controlling;*

California v. *Southern Pacific Co.,* 157 U. S. 229 (1895);

Arizona v. *California,* 298 U. S. 558 (1936);

Vincent Oil Co. v. *Gulf Refining Co.,* 195 Fed. 434 (C. C. A. 5th, 1912).

For an analysis of the rule and collection of authorities see the opinion of Vinson, *J.* (now Chief Justice Vinson) in *Green* v. *Brophy,* 110 F. (2d) 539 (C. A., D. C., 1940).

Keegan v. *Humble Oil & Refining Co.,* 155 F. (2d) 971 (C. C. A. 5th, 1946); 6 Cyc. Fed. Proc. Sections 2136, 2140 (2d ed. 1943).

V-B

Constitutional Questions: One thing is an accounting between executor and heirs and another is an accounting under a contract to which other persons are also signing parties.

A. It is very significant that the Respondents, in their statement of the case (Resp. Br. 4), make no reference to the Compromise Contract, *basical fact and law of these proceedings.* Even though it is against their interest, Respondents must have the subconscious realization that their failure to join all the signers of the Compromise Contract in this case constitutes a failure of justice. Respondents prefer now to avoid any suggestions that might put the mind of this Court into the true source of the errors com-

mitted below. There being a contract among heirs, debtors and creditors of the estate (the said Compromise Contract), this accounting, proceeding under such contract (Pr. Rec. 35 t.), must join all the contracting parties, especially when one of the parties not joined (Partnership) is affected in a total sum of over a hundred thousand dollars.

B. However, Respondents, on page 33 of their brief allege:

> "The judgment of the local Supreme Court, which was affirmed by the Court of Appeals, rests on adequate non-federal grounds."

In that they are misleading this Court. Two illustrations are enough answer to Respondents:

Supreme Court opinion (Pr. Rec. 186):

> "The opposing heirs prayed that the executor be ordered to include in his final account the amount of said credit, plus interest thereon. The executor objected, and alleged that the lower court lacked jurisdiction within the proceeding for settlement of the final account, to decide whether or not Mario Mercado e Hijos was indebted to the heirs of Mario Mercado in the sum of $45,359.50, as a loan. The court held that it lacked jurisdiction to decide the question raised by the contestants, because 'it is convinced that in passing upon the additional opposition, marked with the letter (a), it would unavoidably have to pass upon the title, that is, whether or not the $45,359.50 belonged to Don Mario Mercado Montalvo when it was withdrawn from the National City Bank in order to be deposited in court by the partnership Mario Mer-

> cado e Hijos'; and because this was not a proper proceeding for establishing the ownership in favor of or against a third person, 'in this case, the partnership Mario Mercado e Hijos, over which the court has not jurisdiction in the present proceeding.'"

Same Supreme Court opinion (Pr. Rec. 157), on the federal estate tax controversy:

> "The controversy with the Federal Government can not be considered as a sufficient justification for the executor to refrain from paying the legacies at the proper time. That controversy was limited to the sum of $200,000 which was deposited in the National City Bank, in the city of New York, in the name of the testator. The executor could not dispose of that sum without first obtaining the corresponding release or transfer certificate."

And from everywhere in the record it is obvious that this is a typical case where federal questions are present and were passed upon by the Court. In any way, questions of due process are of fundamental character and reviewable, therefore, in any stage of the proceedings.

VI

All local questions presented before the Circuit were reviewable under the doctrine of the *De Castro* case.

The questions of local law involved here are discussed in the Petition and Brief. They constitute inescapable errors of the Court below. For example, charging Mercado Riera with the interest paid up to September 19, 1938, on the inheritance tax when the Compromise Contract provided for charging of the amount paid for each party to said party's respective share in the estate (Pr. Rec. 111-112 t.), is one error that requires review by the Circuit Court of Appeals. Also, holding time as of the essence of the Compromise Contract, though rejecting the executor's evidence to prove that it was not, and in the face of Respondents' Attorney's statement in open court,[1] constitutes a reversible error. Compelling the executor to answer for moneys which he did not receive without a showing of negligence, is, in our judgment, not authorized by local law, or by any other law. The same thing in regard to the ordering of changes or additions in the Compromise Contract affecting parties who were not joined, and for whom the executor was not supposed to answer. And finally, compelling the executor to reimburse a tax which was paid to the People of Puerto Rico after an assessment legally made against which the objectors presented no legal protest (*ante*, page 22); all these constitute inescapable errors of local law, requiring, to say the least, a review, which the Circuit Court erroneously denied.

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1 "MR. POVENTUD:—And why did you rely in what I told you when you knew that I merely was acting as an attorney, and not as a party to the contract?" (T. E. 407)

VII

Question as to the availability for certiorari of the points raised by our Petition and Brief.

Respondents, on page 4 of their brief, allege that this controversy is a private one between private citizens in a purely accounting proceeding. All civil cases participate of that same nature. Whatever public character they may have is reflected by the effect of the decision on all persons similarly situated in the general conglomeration of people.

However, the conclusive answer to Respondents is that, the questions debated here, concerning due process, are always new and reviewable by this Supreme Court; and the question as to the jurisdiction of the Circuit Court to affirm or dismiss under Rule 39 (b), concerns two million Puerto Rican people, and embraces a conflict between Congress and the judiciary in this country, affecting territories of the United States.

VIII

Question in regard to the printing of the record.

We see a certain degree of unfairness, on the part of Respondents, in raising the question relating to the partial printing of the record.

Petitioner's complaint in this case originates, among other reasons, from the procedure in the Circuit Court, of which Respondents took advantage. Thus, before the record was printed, and, on the basis of the typewritten record only, they, Respondents, filed their motion for summary dismissal or affirmance. Under Rule 39 (b), the Circuit Court authorizes that procedure, against which we are strongly protesting. When Respondents' motion for summary action was granted by the Circuit Court, Petitioner

ordered the printing of that part of the record that might be printed in time and necessary to show here the nature of the questions involved. The remaining unprinted record was forwarded to this Court by the Circuit Court, also on Petitioner's motion.

If certiorari is granted, this Supreme Court will order, the printing of the remainder of the record. If the case is remanded with an order to grant a full hearing, then the Circuit Court will order the printing, which it did not order before because of the practice under Rule 39 (b).

It would represent another act deserving our strongest protest, that Petitioner be now forced to answer or be made responsible for a practice in the Circuit Court against which Petitioner is complaining here, and whereby, under Rule 39 (b) he was denied the benefits of the same methods and procedure that are provided by law for appeals from other Courts in the United States. Congress made no distinction, and the Courts should not make any, either.

This point of Respondents, therefore, unfairly raised by them, only serves to establish the righteousness of our position.

Prayer

WHEREFORE, petitioner prays this Court to either grant us the writ of certiorari or a writ of mandamus, compelling the Circuit Court of Appeals to give us the hearing required by the Act of Congress granting Puerto Ricans the right to appeal from decisions of the Supreme Court of Puerto Rico to the Circuit Court of Appeals for the First Circuit.

Respectfully submitted,

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